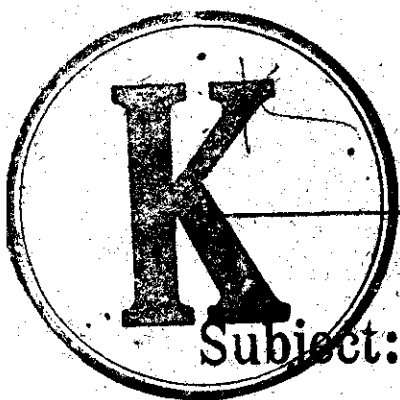


1951

File No. Constitution II
51(N)



Legal Dept
B BRANCH

Subject:-

Notifications under the
Constitution of India

P-96
K

File No. Constitution II/51(N)

Gen. 194

63-B

No. question of the contravention of any Directive Principle as contained in Part IV of the Constitution arises in this case; for, there is no Directive Principle to the effect that every law must bind Government and the subjects alike. That is primarily a question of public policy, and in England the principle established so far is that the Crown is not ordinarily bound by any legislation except by express words to that effect or by necessary implication. Perhaps Shri Modi has in view Article 14 of the Constitution which requires that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Whether exempting the State from the operation of any law infringes this Article is a question of law upon which Government should decline to express any opinion, and attention is invited in this connection to rule 54(5) of the Bombay Legislative Council Rules which says that a question must not ask for an expression of opinion or the solution of a hypothetical proposition. Whether public policy demands that there should be no exemption in favour of Government is a question which any member of the Legislature could have discussed at the time when the law was passed or can bring up for discussion by promoting a Bill for deleting such exemption from the law.

Sd/- P.M. Lad

o.c.

9/1

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 605, dated 10th January 1951.

Mjr/27/6

Office of the R.L.A.

Attention is invited to R.L.A's opinion No. 546, dated 10th January 1951 (Copy attached)..So far as the policy of giving preference to students of this State in the matter of admission to educational institutions is based on the qualification of domicile or residence in the State, it will not be in violation of the provisions of Article 15(1) of the Constitution..However, as pointed out in R.L.A's opinion referred above the legal position as regards the question raised will be finally clarified after the Supreme Court delivers its judgment in the Madras Communal G.O. case.

Sd/- P.M.Lad

O.C.

11/1

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. ⁸⁶⁵856 dated, 15th January 1951.

Mjr/27/6

4 Cs.

Legal Department.

The orders proposed to be issued on the lines of para 5 of the Secretary E.D.'s note are free from legal objection. They may, however, be recast on the following lines.

5. (1) A pupil may be admitted at his choice to any secondary school the medium of instruction in which is either his mother-tongue or the regional language or Hindi.

(2) Save as provided in para.(3) no pupil whose mother tongue is not English shall be admitted to a secondary school, the medium of instruction in which is English.

(3) A pupil whose mother tongue is not English may be admitted to a secondary school the medium of instruction in which is English, provided-

- (a) there is no secondary school within a mile of the residence of the pupil the medium of instruction in which is either his mother tongue or the regional language or Hindi;
- (b) the pupil was already studying in a school, where the medium of instruction was English.

(4) The existing restriction on the expansion of English teaching schools or of admission of students thereto should be cancelled. Also schools should be free to teach English even below standard VIII outside school hours.

Sd/- J.R.Dhurandhar

O.C.

6/2

Additional Secretary to Government.

U.R. to ED. No. 2304, dated the 6th February 1951.

Mjr/27/6

L.C.S.

Legal Department.

Under the Government of India Act, 1915 and 1919 the High Court was not given any power in regard to the posting and promotion of, and grant of leave to, persons belonging to judicial services (cf. section 96 B(2) of the Government of India Act, 1919). The High Court was invested with such powers for the first time under section 255(3) of the Government of India Act, 1935. The orders in Government Circular, J.D. No. 4132, dated 22nd November 1869 delegating to the District Judges the power of granting leave to subordinate judges and the similar orders embodied in Appendix I, serial No. 2 item 13 column 4 (p. 33 of the B.C.S. R. Vol. II) ceased to be valid after the 1st April 1937 on which date section 255 of the Government of India Act, 1935 came into force. Under that sub-section (3) of section 255 of that Act the posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service (as defined in sub-section (1) of section 255) of a Province and holding any post inferior to the post of district judge shall be in the hands of the High Court. The provisions of Appendix I to the Bombay Civil Services Rules, Volume II in so far as they relate to the grant of leave by District Judges to Civil Judges require to be amended so as to be consistent with the powers of the High Court under article 235 of the Constitution of India. (The orders in Government Circular, J.D. No. 4132, dated 22nd November 1869 have become obsolete in view of the provisions of Appendix I to the Bombay Civil Services Rules, Volume II).

Sd/- J.R. Dhurandhar
o.c. 7/2

Additional Secretary to Government.

U.R. to H.D. No. 2418, dated the 8th February 1951.

Office of the R.L.A.

The view taken by Education Department at A at page 26 is not quite correct. An amending Act may contain provisions which may on administrative grounds be found unsuitable in the case of a scheduled area and therefore it will have to be considered in each case whether the amending Act should not be applied to the scheduled area or should be applied with exceptions and modifications. The fact that the parent or the original Act applied to a scheduled area without any exceptions or modifications does not inevitably lead to the conclusion that the amending Act should also apply to the without any exceptions or modifications.

Sd/- J.R.Dhurendhar 22/6

O.C.

Remembrancer of Legal Affairs.

U.R. to E.D. No 10020, dated the

23rd June 1951.

Mjr/27/6

5 Cs.

Government in the Local Self Government and Public Health Department is now proposing to make fresh rules for the regulation of admission to Government Medical Colleges in the Bombay State. The Hon'ble Minister for Health in his minute at page 50 observes:-

" The first question that I would like to be decided is whether Government is justified in asking for a Bombay Domicile. Is there such a thing and if so, should Government insist upon it ? I would say persons who have passed the qualifying examination of the Universities in this State should all be eligible whether domiciled in this State or not. Special reservations should be confined to:-

- (i) Backward Classes, ... 7%
- (ii) For Indians from abroad and foreigners nominated by Government of India ... 6 Seats-
- (iii) For the children of those who help administration by being Hon. Medical Officers or by going to rural areas as medical men or doing any other work for the Health Department of the Government of Bombay ... 5 Seats.
- (iv) For students who have passed the qualifying examinations of the Universities in other States of India provided they have obtained more than 50% of the total marks ... 7 Seats.

R.L.A. is requested to state if these reservations are justified vis-a-vis the Constitution.

The Constitution recognizes merely Indian domicile. It does not recognize any State domicile. In the circumstances it is correct not to provide in the rules for domicile in the Bombay State.

As regards reservation (i) art. 29(2) will not permit such reservation in favour of Backward Classes

As regards reservation (ii) there will not be any objection. Such reservation will not offend against.

articles 14, 15 or 29(2) of the Constitution.

As regards reservation (iii) such reservation would offend against article 14. That article, no doubt, permits classification but such classification must have a reasonable and just relation to the subject. It will be difficult to justify this reservation.

As regards reservation (iv), that can be made without offending any provision of the Constitution.

Sd/- J.R.Dhurandhar

24/4

Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 6558, dated the 24th

April 1951.

Mjr/27/6

4 Cs.

Office of the R.L.A.

Attention is invited to R.L.A's opinion No. 478 Confidential, dated the 23rd May 1951. As pointed out in that opinion the Supreme Court in appeal has hold that the Madras Communal Order has contravened article 29(2) of the Constitution and has left the question regarding article 15(1) undecided. However, in virtue of the principle enuniated in that case by the Supreme Court it will not be legally possible to reserve scholarships in educational institutions for any particular communities, e.g. the backward and intermediate classes. To get over the difficulty created by the Supreme Court's judgment the ^{Constitution} ~~constitution~~ of India is being amended. The Bill to amend the Constitution, as introduced in the Parliament, purports to amend, as already stated in the R.L.A's opinion referred to above, article 15(3) of the Constitution. The Bill was referred to the Select Committee and according to the reports in newspapers the Select Committee has made certain changes in the amendment to clause (3) of article 15 as it originally stood, and has also extended the scope of the amendment to cover article 29(2). According to the amendment made by the Select Committee article 15(3) would read as follows:-

"Nothing in this article shall prevent the State from making any special provision for women and children or for the advancement of any socially or educationally backward classes".

If the Bill, as amended by the Select Committee, is finally passed by Parliament there would be no objection to reserving scholarships for the socially or educationally backward classes. Now scholarships can, however, be reserved for any other classes. Before any decision

is taken

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4 Cs.

is taken for reserving scholarships in educational institutions for backward classes, it would be desirable to wait till the Bill to amend the Constitution is passed by Parliament.

Sd/ J.R. Dhruandhar
o.c. 30/5

Remembrancer of Legal Affairs.

U.R. to E.D. No. 8567, dated the 31st May 1951.

Mjr/27/6

4 Cs.

Office of the R.L.A.

The Bill to amend the Constitution is now finally passed by Parliament and awaits the Presidents' assent. As finally passed, clause (4) of article 15 contains the following provisions:-

" (4) Nothing in this article or in clause (2) of article 29 prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

In view of this provision, scholarship can be reserved for the socially and educationally backward classes of citizens after the Bill receives the assent of President. No scholarships can be reserved for the intermediate classes.

Sd/- J.R.Dhurandhar

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Remembrancer of Legal Affairs

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4 Cs.

Office of the R.L.A.

In the Madras case, the petitioners who were students seeking admission to the Medical and Engineering Colleges contended that the Madras Communal Government orders were ultra vires of the Constitution. The orders reserved a fixed number of seats for various communities such as non-Brahmin Hindus, Backward Hindu communities Brahmins, Harijans, Anglo-Indians and Muslims. The Madras High Court in Champakan v the state of Madras (1951) Mad. 149 held that the orders contravened the provisions of article 15(1) and article 29(2) of the Constitution. Article 15(1) of the Constitution provides:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

Article 29(2) provides:

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The Supreme Court in appeal held that the Madras Communal Orders contravened article 29(2) of the Constitution and left the question regarding article 15(1) undecided. The Bill to amend the Constitution introduced in Parliament purports to amend Article 15(3) of the Constitution by adding the following words at the end:-

"or for the Educational, economic, or social advancement of any backward class of citizens."

The Bill does not seek to amend article 29 of the Constitution. The object of the amendment

appears generally to empower a State to make special provision for the educational, economic or social advancement of backward classes. It is probably presumed that a general provision of this type would include the reservation of seats in educational institutions in favour of backward classes and no amendment in article 29 is necessary to carry out that purpose. The amending Bill is before the Select Committee and it will have to be seen in what shape it emerges out of the Select Committee and is finally passed by Parliament. In the meantime, there will not be any legal objection to hold over the filling of seats reserved for backward classes only in educational institutions. It must be, however, noted that the amending Bill does not purport to confer any special advantage on any other classes except backward classes.

Sd/- J.R.Dhurandhar

O.C.

20/5

Remembrancer of Legal Affairs.

U.R. to E.D. No. 478-Confl dated the 23rd May 1951

L.S.G. & P.H.D. 477-Confl dated the 23rd May 1951.

Mjr/27/6

4/ Cs.

The High Court's decision in the case of Nazarally Sherif (Criminal Application No. 920 of 1950) does not affect R.L.A.'s opinion at page 17 (No. 15725 dated 11-11-1950). In that case the accused was according to his case prosecuted by the Customs Authorities and penalised by an order of confiscation of his goods. He was again prosecuted for the offence of cheating. The High Court held that it was not necessary in that case to decide whether the order of confiscation was a punishment contemplated by Article 20(2) of the Constitution but even if it was a punishment, before the subject could invoke the assistance of Article 20(2) he must prove that he has been prosecuted and punished again for the same offence. The High Court came to the conclusion that the accused was not prosecuted again for the same offence and even assuming that he was prosecuted again for the same offence, he was being merely prosecuted and not yet punished and therefore no question of the violation of Article 20(2) arose. The facts in the present case are different. The petitioner was prosecuted and fined by a Criminal Court and as a consequence of his conviction his license was suspended for a temporary period under sub-section (2) of section 136 of the City of Bombay Police Act, 1902. On account of his conviction in the Criminal Court, the petitioner was held unfit to continue as a licensee. The action taken against him was not therefore in violation of the constitutional limitation in Article 20(2).

Sd/- J.R. Dhurandhar

O.C.

12/7

Remembrancer of Legal Affairs.

U.R. to H.D. No. 11088, dated the 13th July 1951.

Mjr/27/6

4 Cs.

Office of the R.L.A.

It appears that the ground on which candidate from other States are charged higher fees, i.e. a capitation fee of Rs. 750 per annum, is that their domicile is different from that of the candidates in the Bombay State . As pointed out by the R.L.A. in his opinion No. 6558 dated 24th April 1951, the Constitution does not recognise any State domicile and, therefore, any difference in treatment accorded by the State based upon a State domicile would be apposed to article 15 of the Constitution. This view is supported by the decisions of the Bombay High Court in State Vs. Shaikh Hussein Shaikh Mahomad criminal Application No. 912 of 1950

o.c. Sd/- J.R.Dhurandhar 10/7

Remembrancer of Legal Affairs.

U.R. to L.S.G. ' P.G.D., No. 10869 dated the 10th July
1951.

Mjr/27/6

4 Cs.

OFFICE OF THE R.L.A.

As pointed out in R.L.A's opinion No. 8567, dated the 31st May 1951, Parliament has passed the Constitution Amendment Bill. But the assent of the President is awaited. A final copy of the amendment has not been received in L.D. However, from the copy of the Bill, as amended by the Select Committee, it appears that a new clause has been added to article 15. The new clause runs as follows:-

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens, or for the scheduled castes and the scheduled Tribes".

In virtue of this new provision in the ~~xxxxxx~~-Constitution, there can no longer be any constitutional bar in the reservation of seats in favour of citizens who belong to socially and educationally backward classes or to the scheduled castes and the scheduled tribes. No seats can be reserved for any other class of the citizens. Sub-section (6) of section 4 of the Bombay Primary Education Act, 1947, as it stands at present, provides that of the members selected by the district local board or by the authorised municipality-

(a) one at least shall be a woman, and

(b) ^{such} number not exceeding ³ ~~3~~, as may be prescribed, shall be from amongst the minorities and backward communities.

The Explanation to sub-section (7) provides that - for the purposes of sub-section (6) minorities and backward communities shall mean such classes and communities as may be prescribed. Rule 4 of the Bombay Primary Education Rules, 1949, provides that for the purposes of constitution of a school board, minorities and backward communities shall mean the classes and communities specified in Schedule B. Schedule B to the Rules

specifies the Muslims and the Indian Christians as the minority communities. It further specifies the backward communities by giving a full list thereof. The provisions of the Bombay Primary Education Act, 1947, in so far as they make provision for reservation of seats for the minorities are now void and the Act will have to be amended to that ^{extent} extent. So far as the reservation of seats for backward communities is concerned, if those communities as specified in the Rules- i.e. in Schedule B to the Rules- are socially and educationally backward classes, or are the scheduled castes and the scheduled tribes, the reservation cannot be said as unconstitutional. However, the relevant provision in the Act may be amended so as to bring it in line with the phraseology adopted in the new provision added to article 15 of the Constitution. The rules made under the Act will also require suitable amendments.

2. It will be apparent from what is stated above that no reservation of seats can be made in educational institutions in favour of the intermediate classes. In view of the new provision added to article 15, such reservation can be made only in the case of socially or educationally backward classes of citizens and the scheduled castes and the scheduled tribes.

Sd/- J.R.Dhurandhar

. o.c.

8/6

Remembrancer of Legal Affairs.

U.R. to E.D. No. 9124, dated the 9th June 1951.

Mjr/27/6

4 Cs.

Office of the R.L.A.

The posts of the members of the Tribunal have not been excluded from the purview of the Public Service Commission and it was therefore necessary to consult the Commission before making appointments to these posts.. Since the question whether these posts should be excluded from the purview of the Commission was not decided but was under consideration, the contention of the Development Department that the failure to refer to the Commission the question of appointments to the posts was not due to oversight. seems to be correct.

Sd/- J.R.Dhurandhar
13/7

o.c.

Remembrancer of Legal Affairs.

U.O. to H.O. No. 4488, dated the 14th July 1961
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4 Cs.

Office of the R.L.A.

Under the Constitution the President has power to issue an order adapting various existing Acts to bring them in line with the Constitution. The President has already issued two such orders. The State Government has no power to adapt the Acts, by an order. It is the duty of the administrative Department to undertake legislation when it is brought to its notice that any of the Acts which it is administering is not consistent with the Constitution. As pointed out by Secy. E.D., the Education Department will have to undertake the amendment of the Bombay Primary Education Act and the rules thereunder for the purpose.

Sd/. J.R.Dhurandhar

o.c.

17/7

Remembrancer of Legal Affairs.

U.R. to E.D., No. 11345, dated the 17th July 1951.

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4 Cs.

Office of the R.L.A.

The point referred to the R.L.A. for consideration is whether the policy followed by the Madras Government in issuing licences only to the fishermen of the Madras State for certain types of fishing is constitutionally valid. A similar question was considered by the Supreme Court of America with reference to a California Statute forbidding the issuance of commercial fishing licenses to aliens ineligible to citizenship. The Supreme Court held that the State prohibition of the issuance of commercial fishing licenses to persons ineligible to citizenship makes an unreasonable classification in violation of the equal protection clause (see *Torao Takahashi v. Fish and Game Commission*: 334 US 410-431). The present case is stronger than the American case. In this case not only aliens but citizens of other States of the Union would be refused the necessary licenses. Such refusal would obviously be in violation of the equal protection clause of Article 14 of the Constitution of India. If, however, the Madras Government desires to conduct fishing itself, it can exclude any other person.

Sd/- J.R.Dhurandhar

o.c.

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Remembrancer of Legal Affairs.

U.R. to D.D. No. 11822, dated the 25th July 1951.

Mjr/27/6

4 Cs.

Office

The first difficulty which the Bishop of Ahmedabad has raised is with reference to Government Resolution of 17th July 1947 to which he has made a reference in his memorandum at p 3 ante. According to that Government Resolution, it was directed that Schedule Caste converts to Christianity should not be held eligible even on individual certification basis, for the educational concessions provided by Government for the Scheduled Castes. The main contention of the Bishop is that a convert from a Scheduled Caste to Christianity should not lose the educational concessions provided by Government for the Schedule Castes.

2. Article 366(2A) of the Constitution defines "Scheduled Castes" as meaning such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution. Article 341 of the Constitution authorises the President to specify by a public notification the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State. Under this Article on 10th August 1950 the President made an order called the Constitution (Scheduled Castes) Order, 1950. Part III in the Schedule to that Order specifies the castes, races or tribes which shall be deemed to be Schedule Castes throughout the State of Bombay and also in certain parts thereof. Para 3 of that Order provides that no person who professes a religion different from Hinduism shall be deemed to be a member of a Scheduled Caste. It will be seen from the provisions of Article 341 that the specification of the castes, races or tribes as Schedule Castes is for the purposes of the Constitution.

It is

It is nowhere stated in the Constitution or in the Order made under Article 341 that the specification is for the limited purpose of reservation of seats for a Scheduled Caste. In view of the wording of Article 341 and the Scheduled Castes Order made thereunder, a person who professes a religion different from Hinduism shall cease to be a member of a Scheduled Caste for all purposes of the Constitution. A convert to Christianity no longer therefore remains a member of the Scheduled Caste and cannot therefore legitimately claim any educational concessions provided by Government for the Scheduled Castes. Even assuming for a moment that the Scheduled Castes Order of 1950 relates only to the question of reservation of seats for the Scheduled Castes and does not affect a ~~XXXXXX~~ convert to Christianity as regards his rights to educational concessions it can hardly be regarded that a convert to Christianity continues to remain a member of the Scheduled Caste. The position has been lucidly explained in the note of the Chief Secretary dated 22nd December 1950 to which attention is invited. If, therefore, a member of a Scheduled Caste is on his conversion to Christianity denied educational concessions admissible to members of the Scheduled Castes it is on the ground that he is no longer backward socially and economically. The ground on which the concessions are denied to him are not on the ground of religion but on the ground of his uplift to a higher level both socially and economically in the society in which he lives. The denial of educational concessions to him is not therefore within the prohibition of Article 15 of the Constitution. As pointed out in para 4 of the Chief Secretary's note referred to above if the number of such individuals is sufficiently large to form a group, it is open to Government to treat them as a class socially and economically backward so as to enable them to have

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the benefit

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the benefit of articles 15 and 29 of the Constitution in spite of the fact that the member of such group have ceased to be the members of a Scheduled Caste by reason of their conversion to ~~Christia~~ Conversion to Christianity.

3. The second difficulty to which reference has been made by the Bishop of Ahmedabad in his memo at p 7 ante is that the Ahmedabad Municipal School Board has put a ban on the admission of children whose mother tongue is Gujarati, Marathi, Tamil, Urdu, Sindhi or Hindi to the Primary sections of the two schools viz. the St. Xavier's High School for Boys and Mt. Carmel convent for girls where the medium of instruction is English. The orders issued by the Ahmedabad Municipality for imposing such a ban are at the instance of the Director of Public Instruction. But there is nothing wrong in the imposition of such a ban. Attention is, in this connection, invited to R.L.A's opinion No. 2304 dated 6th February 1951. The orders issued by the Ahmedabad Municipality are free from legal objection.

4. The third difficulty raised by the Bishop of Ahmedabad is that several of the new primary schools have been refused recognition by the Ahmedabad District School Board merely on the ground of there being a Local Board School in the vicinity. The Bishop has made a request that the primary schools run by private body and recognised by Government should be recognised and registered for grant-in-aid if they are found efficient according to the Primary Education Rules and that they should not be refused registration for grant-in-aid on the pretext that there is another school in the vicinity unless the population is less than 700 souls. Under sub-rule (2) of rule 107 of the Bombay Primary Education Rules the school Board grants recognition to a school as an approved school if it is satisfied about the need the school in the locality. As the matter is

left...

the satisfaction of the School Board it will be perfectly open to the School Board to refuse recognition to any school if it is not satisfied about the need of the school in the vicinity. There is however, a remedy left open to schools which have been refused recognition by the School Board and this is provided for in sub-rule (3) of rule 107. Under the proviso to that sub-rule a school which has been refused recognition can submit an appeal to the Educational Inspector of the Division. As long as the rule stands any school desirous of recognition as an approved school will have to abide by the provisions thereof. No question of transgression of any fundamental right is involved here and the Bishop cannot complain that the rule violates any of the fundamental rights granted to a subject under the Constitution.

Sd/- J.N.Dhurandhar

O.C.

15/10

Remembrancer of Legal Affairs.

U.R. to E.D. No. 16394, dated the 16th October 1951.

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4 Cs.

Office of the R.L.A.

The question for the consideration of the R.L.A. in the present case is whether the power to arrest and imprison a person given to the Collector under the last paragraph of section 202 of the Bombay Land Revenue Code, 1879 is affected by the provisions of the Constitution of India.

2. The relevant articles are articles 21 and 22 of the Constitution.

3. Clause (1) of article 22 of the Constitution provides that no person who is arrested shall be detained in custody-

(i) unless he is informed as soon as may be of the grounds for such arrest,

(ii) unless he is given the right to consult and to be defended by a legal practitioner.

Clause (2) of the article then adds that the person must be produced before the nearest magistrate and that magistrate will then decide for what period the detention shall continue.

4. Article 22 of the Constitution refers to a person who is arrested. In its general sense, the expression "to arrest" means to deprive a person of his liberty by legal authority. In civil practice it means the apprehension of a person by virtue of a lawful authority to consider the demand against him in a civil action (cf. sections 55 to 59 of the Civil Procedure Code). In criminal cases it means the apprehension or detaining of a person in order to be forthcoming to answer an alleged or suspected crime (see Black's Law Dictionary, p. 141). In order to ascertain the meaning of the expression "arrest" and "detention" in article 22, it is necessary to read clause (1) and clause (2) together. Clauses (3) to (7) of the Constitution relate to "preventive detention" which is dealt with separately. These clauses have no reference to the question at present under consideration. Reading, however, clauses (1) and (2) of article 22, it seems clear that the arrest and detention referred to in the said clauses has no reference to arrest and detention in its general sense or to arrest and detention in civil proceedings. For instance, th

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provisions of section 55 to 59 of the Civil Procedure Code referred to above provide that a person who is arrested in execution of a decree of a civil court has to be produced before that court as soon as practicable and his detention then may be ordered in a civil prison. These provisions also provide for the period of his detention and all other matters cognate to such arrest and detention. Similar provisions are contained in the Revenue Laws of every State (cf. section 157 of the Bombay Land Revenue Code). It is obvious that the provisions of article 22 (clauses (1) and (2), which provide that the person arrested must be taken before a nearest magistrate within 24 hours and that the said magistrate should then determine the period of his detention would not have any reference to or connection with the arrest and detention of a person under the Civil Procedure Code or under any revenue law. These cases fall under article 21 of the Constitution which provides that the liberty of a person can be deprived in any manner provided by law.

5. The presumption made by the Collector of Ahmednagar that the power to arrest and imprison under section 202 of the Bombay Land Revenue Code, 1879, is not affected by the Constitution is, therefore, correct.

Sd/- J.R.Dhurandhar

o.c.

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Remembrancer of Legal Affairs.

U.R. to R.D. No. 16781, dated the 22nd October, 1951.

Mjr/29/6

4 Cs.

Office of the R.L.A.

Attention is invited to R.L.A.'s opinion No. 9065, dated the 8th June 1951. In that opinion the position as regards reservation of scholarships for intermediate classes has been stated. In view of the amendment made in article 15 of the Constitution by the Constitution (First Amendment) Act, 1951, it would be open for Government to reserve scholarships for the socially and educationally backward classes of citizens but no scholarships can be reserved for any community as such. It appears from these papers that the Marathas for whom the scholarships referred to in these papers had been reserved belonged formerly to the intermediate classes. In view of the provisions in the Constitution against discrimination, no scholarships can now be reserved for the Marathas as such unless they are considered as socially and educationally backward classes of citizens within the meaning of clause (1) of article 15 of the Constitution. The expression "socially and educationally backward classes of citizens" has not been defined in the Constitution. It is however open to Government to hold that the Marathas are a class which *is socially and educationally backward*. If Govt. is *to* declare the award of scholarships to Marathas can be held to be valid.

It appears from these papers, particularly from the letter of the Deccan Maratha Education Association, Poona, addressed to Her Highness Shrimant Chimbai^a Shheb Gaekwar that scholarships to the extent of Rs. 1,800 are being awarded yearly to deserving Maratha girls. In view of the provisions contained in clause (3) of article 15, the award of scholarships to Maratha girls would not ordinarily be valid. But as stated above if Government holds that Marathas form a class which is socially and educationally backward, scholarship

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in favour of Maratha girls would not offend against
the Constitution.

Sd/- J.R.Dhurandhar

O.C.,

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Remembrancer of Legal Affairs.

U.R. to E.D. No 1734C-. dated the 2nd November 1951.

Mjr/29/6

4 Cs.

Office of the R.L.A.

Under Article 16(4) of the Constitution, it is open to the State Government to make the reservation of appointments or posts in favour of any backward class. Article 335 only provides that in making appointments, the claims of the members of Scheduled Castes and the Scheduled Tribes have to be taken into consideration. The Article does not provide for the actual reservation of appointments and posts for the members of such Castes and Tribes. The Scheduled Castes and Tribes will presumably be included among backward classes. If so, the members of such Castes and Tribes would get the advantage of any reservation made under Article 16(4). No separate reservation can be made for the members of such Castes and Tribes.

Sd/- J.R.Dhurandhar

O.C.

29/11

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 19145, dated the

29th November 1951.

Mjr/29/6

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Article 15(1) of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. It is no doubt true that under that Article no discrimination can be made only on the ground of place of birth. But the grant of a scholarship to a student going from Bombay to any place outside the State is not only on the ground that he is born in Bombay, Such scholarship is granted on the ground that such student will find it difficult to pursue his studies at a place outside the State. Article 15(1) of the Constitution will not be a bar to the grant of such scholarships.

Sd/- J.R.Dhurandhar

O.C.

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Remembrancer of Legal Affairs.

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WR W E.D.N. 18779 dt. 23-11-51

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Article 313 of the Constitution provides that until other provision is made in this behalf under this constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an All-India service or as service or post under the Union or a State, shall continue in force so far as consistent with the provisions of this Constitution. The opening words "until other provision is made in this behalf" in the said article refer to article 309. So far as the Bombay State is concerned, under article 309 the power to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State is given to two authorities, first to State Legislature to enact an Act for the purpose and secondly, to the Governor or such person as he may direct to make rules for the purpose. This latter power is to be exercised only until an Act is made by the State Legislature. It will thus appear that where no rules are made in virtue of the proviso to article 309 by the Governor or by the person directed by him, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post under the State shall continue in force by the operation of article 313 so far as consistent with the provisions of this Constitution. Where the rules have been so made under the proviso to article 309, those rules will remain in force.

o.c.

Sd/- J.R. Dhurandhar
8/12

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 19518, dated the 5th December 1951.

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In Circular Memorandum No. 2733/34, dated 21st May, 1951, it is stated:

" It is a statutory requirement that before an order of dismissal, removal or reduction is passed against a Government servant he should be supplied with a copy of the report of the Enquiry Officer who conducted the departmental enquiry against him and he should be served with a 'show cause' notice giving him an opportunity to show why the punishment in question should not be imposed on him."

Secretary, Home Department, raised the question whether reduction in rank includes reduction in pay also. The

Political and Services Department in its office note at page 7 ante states:

" Reduction in rank is not the same as reduction in pay. Both are distinguishable but they fall under the common penalty which is known as 'reduction'. Please see in this connection clause (iii) of rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules and clause (iii) of rule 49 of the Civil Services (Classification, Control and Appeal) Rules.

Secretary, Home Department, in his note at page 10 ante states:

" The words 'reduction in rank' are in the relevant article of the Constitution. The whole point of my note is that reduction in pay is not necessarily reduction in rank and so the constitutional requirement of a show cause notice for punishment does not apply. The G.R. refers to the constitutional requirement. The constitutional requirement goes beyond rule 55 of the Rules. The question therefore is not whether there should be a departmental enquiry or not but whether the constitutional requirement has to be observed or not."

The R.L.A. is requested to advise whether "reduction in rank" as used in the Constitution includes reduction in pay also

Article 311(2) of the Constitution of India provides that no such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Section 240(3) of the Government of India Act, 1935, contained a similar provision. That section provided:

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" No such person as foresaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".

The words "reduced in rank " in section 240(3) of the Government of India Act were considered in Provincial Government, C.P. & Berar v Shamsul Hussain (A.I.R. (1949) Nagpur 118). In that case Shri Justice Bose observed:

" When a man is suspended he is, in our opinion reduced in rank . It is evident that suspension is not the equivalent of dismissal because, if it were, then the present contention would fall to the ground. But if the man continues in service what rank does he hold? Clearly not the rank he occupied at the date of suspension. He is not entitled to discharge any duties while under suspension. He is not entitled to draw his pay. It is evident then that he does not continue to hold his substantive rank because two of the fundamental attributes of rank, except when honorary, are the right to discharge its duties and the right to draw its pay. If then he continues in service but ceases to hold the rank he did, then there must have been a reduction in rank and in our opinion an officer 'under suspension' which is what he is officially called, means and officer ^{whose rank has been reduced within the meaning of sub-section (3)}.

The words "reduced in rank" in article 311(2) of the Constitution of India will have to be similarly construed. If a servant's pay is reduced, he cannot be considered to be drawing the pay of the post, which is one of the two fundamental attributes of his rank. Consequently, reduction in pay would amount ~~to reduction in rank~~ to reduction ⁱⁿ rank. This view is consistent with rule 33(2) of the Bombay Civil Services Conduct, Discipline and Appeal Rules. The view taken by the Political and Services Department is correct.

Sd/- J.R.Dhurandhar

O.C.

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Remembrancer of Legal Affairs.

U.R. to P & S. D. No. ~~1212~~ 19621p dated the 6th December,

1951

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In connection with the abolition of the study of English in the Primary Education course, Government decided in 1948 that certain restrictions ~~should be~~ placed on admissions to Anglo-Indian Schools in which the medium of instruction was English. In pursuance of that policy certain schools which did not fall under the category of Anglo-Indian Schools, but in which the medium was English, exemption was granted for 3 years in their favour. After the lapse of three years, Government revised the policy and on 24th February 1951 passed G.R. (E.D.) No. 2051 in which it was ordered as follows:-

(a) Admissions to Schools in which English is permitted to be used as the medium of instruction should be confined to the following categories only, subject to (b) below:-

(i) Children whose mother tongue is certified by the parent or guardian to be English;

(ii) children who have previously been studying with English as the medium of instruction;

(iii) children for whom facilities for receiving instruction in their mother tongue (whether it be a regional language or otherwise) are not available within a radius of one mile of their homes, when so certified by the Educational Inspector; and

(iv) Children whose parents or guardians are liable to inter-State or inter-Regional transfer in the course of public or private service, on the production of a certificate to that effect from the head of a Government Department or a private concern, as the case may be.

(b) The schools, other than Anglo-Indian

Schools, which were specially permitted to use English as the medium of instruction for three years to start ~~with the medium of instruction for three years to start~~ with will continue to enjoy this concession for the present. Admissions to these schools will be made in accordance with (a) above.

2. Objection is taken to the above orders on the ground that they are inconsistent with ~~or~~ contravene the provisions of Articles 15, 29 and 30 of the Constitution

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Article 15(1) provides that the State shall not discriminate against any citizen only on the grounds of religion, race, caste, sex, place of birth or any of them. Clause (2) provides that no citizen on the ground of religion, race, caste, sex or place of birth will be subject to any disability or restriction in regard to the access to or use of any shop, public restaurant, well etc. It is true that the Government restriction referred to in para. 1 above is merely an executive order. But according to the decision of the Madras ~~Supreme~~ High Court, affirmed by the Supreme Court in the Madras Communal Government Order case, even an executive order of Government if inconsistent with any of the provisions of Part III of the Constitution will not be valid and an action can lie to have it set aside (Shrimati Champakam V. State of Madras (1951) Mad. 149, (1951) S., C.R. 313). In that case the Madras High Court held that the order contravened the provisions of Articles 15 and 29. The Supreme Court however confirmed the decision of the High Court on the ground that the order violated the provisions of Article 29, but left the question regarding the contravention of Article 15 open. In any case the said decisions related to cases where persons were denied admission on the ground that they did not belong to depressed classes. The Courts therefore were justified in holding that the Madras order was bad. In any case Article 15 of the Constitution has no application to the validity of the Government Resolution No. 2051 of 24th February 1951. That Resolution does not discriminate against any citizen on the ground of religion, race, caste or sex. So also Article 30 has no application. Clause (1) of the Article provides that all minorities based on religion or language shall have a right to establish and administer educational institutions of their choice. There is nothing in the Government Resolution referred to above which affects the rights of

any minority based on language, to establish and admit its own educational institution. The clause (2) of the Article adds that no discrimination shall be made in granting aid to institutions so established. Even assuming that Government refuses to give grant-in-aid to any institution established by a language minority on the ground that it did not follow the orders contained in the Government Resolution, such refusal would not be discriminatory and would not offend the provisions of Article 30(2).

3. The only Article which has some relevance to the question at issue is Article ~~31~~ 29 Clause ⁽¹⁾ of that Article provides that any section of the citizens having a distinct language, script or culture of its own shall have the right to conserve the same. It does not appear the Women's Council or any of the protagonists are affected by the Government Resolution on the basis of clause (1) of Article 29. Clause (2) of the Article provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. As stated above the orders contained in the Government Resolution have no reference to the religion, race or caste of any pupil. It is true that it refers to the mother tongue of a pupil. But Article 29(2) does not mean that every school must admit all pupils whatever their mother tongue, even though it may not provide for the medium of instruction through the mother tongue of that pupil. Thus if a pupil knowing Marathi, Gujarati or Canarese seeks admission to a School where the medium of instruction is English only, it does not follow that the School must admit such pupil. The ground for the refusal of admission to such pupil would not be the language of the pupil, but the system of the medium of instruction adopted or followed in that

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particular school. The same reason or principle would apply to a school which is directed not to admit pupils whose mother tongue differs from the medium of instruction followed by that school. It must be noted in this connection that "Education" is one of the subjects which falls in the State List (see entry No. 11 in List II in the Seventh Schedule to the Constitution). The State Executive which has the same powers as the State Legislature is competent to pass any orders as it thinks proper to further its educational policy. By Article 343 of the Constitution English cannot continue to be the official languages of the Union. Under Article 345 power is given to the Legislature of the State to adopt Hindi or regional languages as the official languages of the State. Already a Bill is before the Legislature in that respect. Therefore, to carry out the policy laid down by the Constitution and taking other circumstances into consideration, if Government has passed the orders contained in G.R. (E.D.). No. 2051 dated 24th February 1951, it cannot be held that Government has acted unreasonably or arbitrarily. In any case the orders contained in the said Resolution do not contravene any of the fundamental rights contained in Article 15, 29 or 30.

4. As the question is of importance, the Advocate General is requested to advise and to give his opinion at an early date.

Sd/- J.R.Dhurandhar

Remembrancer of Legal Affairs.

U.R. to Advocate General, No. 881-Conf1, dated 19th October

1951.

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21st November , 1951

U.R. to the Advocate General No.

881.Confl. dt 19th Oct. 51.

O P I N I O N

I am of opinion that any objection that could be taken to the orders contained in G.R. (E.D.) No. 2051 dt 24th Feb., 1951 would be under article 29(1) of the Constitution of India. That article provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State Funds on grounds only of religion, race caste, language or any of them. An argument that under this resolution admission is denied on the ground of language may appear prima facie plausible. The article however would apply if admission is denied only on the ground of language. In this particular case, however, admission is not denied only on the ground of language. Admission is regulated on the ground of medium of instruction being in English. The article, therefore, would not apply. I therefore agree that there would be no contravention of any of the fundamental rights.

Sd/-

THE ADVOCATE GENERAL OF BOMBAY

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A copy of the Statement of the Case together with a copy of the opinion of the Advocate General who was, consulted in the matter is sent herewith.

Sd/- J.R.Dhurandhar

o.c.

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Remembrancer of Legal Affairs.

U.R. to E.D. No. 18889,,dated the 24th November 1951.

Mjr/29/6

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